SANUSI MAT KARTO A

v.

PP

HIGH COURT MALAYA, MUAR B
AHMADI ASNAWI JC
[CRIMINAL APPEAL NO: 42-34-2007]
3 NOVEMBER 2008

CRIMINAL LAW: *Penal Code - Section 376B - Rape - Incest - Finding of prima facie case - Failure to recall and examine witnesses - Whether Sessions Judge erred in law - Discretion of Sessions Judge - Criminal Procedure Code, s. 261 - Whether appellant materially prejudiced and jeopardized* C

CRIMINAL PROCEDURE: *Charge - Sexual offence - Whether contained particulars as to time of commission of offence - Whether time given in charge sufficient - Whether there was a violation of s.153(1) Criminal Procedure Code - Whether appellant prejudiced* D

EVIDENCE: *Similar fact evidence - Admission of - Whether relevant and admissible under ss. 14 and 15 Evidence Act 1950 - Whether there was miscarriage of justice - Whether appellant prejudiced* E

CRIMINAL LAW: *Penal Code - Section 376B - Rape - Incest - Charge - Whether original copy of Surat Beranak a material ingredient of the charge - Whether failure to produce original Surat Beranak fatal - Uncontroverted evidence of victim that she was 12 years old at the material time - Whether victim deemed to be incapable of giving consent* F

EVIDENCE: *Witness - Credibility - First information report - Word 'rogol' used in report - Whether victim understood meaning of word 'rogol' - Whether there was evidence to show victim coached to use word 'rogol' - Delay in lodging police report - Whether plausible reason given for delay - Victim's evidence tested against totality of evidence of other witnesses - Whether victim a credible witness* G H

EVIDENCE: *Witness - Credibility - Uncorroborated evidence - Allegation of - Whether victim's evidence should be accepted - Whether victim's evidence amply corroborated by testimonies of medical officer and victim's mother - Whether there was failure to heed requirement of s. 133A Evidence Act 1950* I

A ***CRIMINAL LAW:*** *Penal Code - Section 376B - Rape - Incest - Defence of impotency - Failure to put defence during testimonies at prosecution stage - Whether defence an afterthought - Whether incumbent upon prosecution to prove potency of appellant - Whether defence of impotency was without merit*

B

The appellant faced the amended charge of incest with his 12 year old granddaughter (SP2), an offence punishable under s. 376B(1) Penal Code. The appellant was found guilty and convicted of the offence and was jailed for 15 years. The facts adduced revealed C that it was the daily routine of the appellant to ferry SP2 to her afternoon Sekolah Agama classes. On one fateful afternoon, instead of going directly to her school, the appellant took SP2 on his motorcycle to a deserted Ladang Kelapa Sawit at Bukit Kera Moyang and mercilessly ravished the victim. After few such D incidents the victim decided to inform her mother, SP3, who promptly took her to the police station to lodge a report. The amended charge was grounded upon this incident at the said Ladang Kelapa Sawit. The hearing of this matter was earlier presided by the first Sessions Judge but before the prosecution E could close its case, she was transferred to another court. Subsequently, another learned Sessions Judge continued from where the first Sessions Judge left off and made a finding that a *prima facie* case had been made out against the appellant and called upon him to enter his defence and finally convicted him of F the same. It was the failure by the learned Sessions Judge to recall and examine witnesses that the appellant was now complaining. It was the appellant's principal ground of appeal that the learned Sessions Judge by so doing had erred in law and in fact when he took the role of an appeal judge instead of that of G a trial judge resulting in the appellant being materially prejudiced. In the alternative, it was submitted that the finding of a *prima facie* case by the learned Sessions Judge who had not seen or heard the witnesses jeopardized the appellant. The appellant also argued that (i) the charge preferred contained no particulars as to the time H of the commission of the offence, a violation of s. 153(1) of the Criminal Procedure Code; (ii) the first Sessions Judge had erred in law and in fact when she allowed the admission of similar fact evidence which was equally prejudicial to the defence; (iii) the learned Sessions Judge failed to take into account the failure of I the prosecution to produce the original copy of SP2's Surat Beranak when the same was specifically mentioned in the charge; (iv) that the learned Sessions Judge failed to properly consider the

credibility of the victim; (v) that the learned Sessions Judge failed to heed the requirement of s. 133A of the Evidence Act 1950 in accepting SP2's uncorroborated evidence (vi) the learned Sessions Judge had erred in law and in fact when he failed to properly assess and consider the appellant's defence of suffering from impotency for the past ten years and therefore was incapable of performing the act of sexual intercourse.

Held (dismissing appellant's appeal):

(1) Section 261 of the Criminal Procedure Code offers a sufficiently wide berth for the succeeding judge to exercise his discretion whether to act upon the evidence recorded by his predecessor or otherwise re-summon the witnesses or start afresh. It is for him to make a proper assessment upon perusal of the evidence already recorded that the same is sufficient for the purpose of the continuation of the trial until its full completion without posing any hindrance to him to make a proper finding at the end of the day however crucial the witness or witnesses are. Upon perusal of the records, the learned Sessions Judge did not err when he exercised his discretion not to re-summon and re-hear the witnesses. He was not wrong to be satisfied with and acted upon the evidence recorded by the first Sessions Judge. That was well within his discretion to do so, a perfect exercise provided by the said s. 261 of the CPC. (paras 11 & 12)

(2) The time given in the charge *ie*, '... di antara awal bulan Januari 2003 hingga awal bulan Februari 2003 ...' was sufficient enough to give notice to the appellant as to the time he was alleged to have committed the offence. It was related to a certain date during that span of time. The notice relating to the said time was made further apparent when it was followed by the specific location where the offence was committed *ie*, '... di dalam Ladang Kelapa Sawit Bukit Kera Moyang' and nowhere else. The manner in which the time was given in the charge could not in any way prejudice the appellant in preparing his defence. At all times during the trial the appellant was very well aware what the nature of the charge against him was and he came prepared with his defence. (para 21)

(3) The first Sessions Judge had allowed SP2's evidence that she was altogether raped five times whereas the charge referred to only one incident of incestuous relationship. However, such evidence was relevant and admissible under ss. 14 and 15 of the Evidence Act 1950 as the said incidents took place within the time span intimated in the charge. Though the learned deputy prosecutor did not follow up with his statement to the court that the prosecution was at liberty to file additional charges against the appellant on account of the said testimony by SP2, the failure of the prosecution to do so did not in anyway prejudice the appellant materially. Further, the evidence led by the prosecution clearly showed that the focus was on the incident that took place at the Ladang Kelapa Sawit Bukit Kera Moyang. The learned Sessions Judge did not take into account the other four incidents in his findings. He was focused only upon the incident intimated in the charge. His findings were not corrupted by the four other incidents. He was entirely correct in doing so. It did not occasion a miscarriage of justice. (paras 23 & 24)

(4) The original copy of the Surat Beranak was not a material ingredient of the charge. It was the uncontroverted evidence of SP2 that her date of birth was 28 August 1991. She could remember this date even without referring to her Surat Beranak. Hence, the evidence was concrete that she was 12 years old at the material time of the incident. The failure of the prosecution to produce the original Surat Beranak was thus not fatal. On a charge under s. 376B of the Penal Code, it was incumbent upon the prosecution to only prove that both the appellant and SP2 were not permitted under the law, religion, custom or usage applicable to them to marry each other, the appellant had sexual intercourse with SP2 and the sexual intercourse was without the consent of SP2. Since SP2 was only 12 years old at the material time she shall be deemed to be incapable of giving consent. (para 25)

(5) Exhibit P3 was merely a first information report which triggered the police investigation against the appellant. SP2 may not understand the word 'rogol' or how to say it ordinary parlance but her description of what the appellant did to her, in particular her description of the act of sexual intercourse where the appellant forced his private part to enter into her

private part was more than sufficient to show what she intended to say in her police report. Her testimony in court clearly negated the proposition that she was coached by someone to put the word 'rogol' in her police report. On no account could this issue be construed adversely against the credit of SP2. Further, the delay in lodging the police report was not unique to this particular case. It was not an uncommon occurrence. Here SP2 testified that she did not immediately lodge a police report because she was frightened. This was a plausible enough reason. SP2's evidence was tested against the totality of the evidence of other witnesses. Having done so, the learned Sessions Judge found SP2 to be a credible witness and accepted her testimony. (paras 27 & 28)

(6) The learned Sessions Judge's reading of s.133A of the Evidence Act 1950 was correct. SP2 had given evidence on oath and had understood it. As such there was nothing to prevent the acceptance of her evidence even if uncorroborated, provided the court was satisfied with her evidence. This was the approach taken by the learned Sessions Judge. He was satisfied with the evidence given by SP2. Her testimony was related to the events leading to the sexual intercourse and the sexual intercourse itself was vivid and crystal clear. She could not have invented her testimony unless she went through the experience herself. Her testimony was unequivocal that the appellant entered his private part into hers. There was no reason to treat her testimony with suspect. However, contrary to the submissions of the learned counsel, SP2's evidence was amply corroborated by the testimony of SP1, the medical officer who conducted a medical examination on her. She confirmed that the victim's external genitalia examination revealed an old hymen tear and confirmed further that the tear was occasioned by an entry of blunt object the like of the male private part into SP2's vagina. Additionally, the testimony of SP5, SP2's mother was accepted as corroborate evidence. (paras 29, 30, 31 & 33)

(7) The appellant's defence of impotency was never put to SP2, SP1 or the investigating officer during their testimonies at the prosecution stage. It was sprung for the first time when the appellant offered his defence from the witness box. Hence, it was the learned Sessions Judge's finding that the said defence

was merely an afterthought. The learned Sessions Judge was entirely correct. The law is trite that it behoves upon the defence to put its case at the earliest possible stage, one of which is through the cross examination of the witnesses at the stage of the prosecution's case, otherwise the defence faces the risk of being branded as a recent invention. Further, there was no fault in the learned Sessions Judge's legal proposition that it was not incumbent upon the prosecution to prove the potency of the appellant. The uncontroverted evidence of SP2 that the appellant forced his private part into her private part and the slimy watery substance spurting from the appellant's private part after the sexual intercourse was done were clear evidence of the appellant's sexual prowess and potency. It was not wrong for the learned Sessions Judge to find as he did in fact found, that the appellant's defence of impotency was without merit. The evidence adduced wholly fortified his rejection of the said defence. (paras 39, 40 & 41)

Case(s) referred to:
Abdul Hamid Udin v. PP [2000] 1 LNS 198 ***(refd)***
Amran Ahmad v. PP [2006] 2 CLJ 897 ***(foll)***
Azahan Mohd Aminallah v. PP [2005] 1 CLJ 374 CA ***(refd)***
Chiu Nang Hong v. PP [1964] 1 LNS 24 ***(refd)***
Chong Kwee Hian v. PP [1948] 1 LNS 10 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***
Hussin Sillit v. PP [1988] 2 CLJ 9; [1988] 1 CLJ (Rep) 128 SC ***(refd)***
Ku Lip See v. PP [1981] 1 LNS 155 FC ***(refd)***
Loo Chuan Huat v. PP [1971] 1 LNS 68 ***(dist)***
Mohammad Idris Hj Mohamed Said v. R [1948] 1 LNS 35 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim & Anor [2001] 3 CLJ 313 ***(foll)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Jon [1992] 1 LNS 13 ***(refd)***
PP v. Richard Devadasan Sabariah [2004] 4 CLJ 367 ***(dist)***
Sidek Ludan v. PP [1995] 1 LNS 219 ***(refd)***
Syed Abu Tahir Mohd Esmail v. PP [1988] 1 LNS 126 ***(refd)***
Tengku Mahmood v. PP [1974] 1 LNS 176 ***(foll)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 153(1), 261(a), 271
Evidence Act 1950, ss. 14, 15, 133A
Penal Code, s. 376B

For the appellant - Pritam Singh; M/s Syarikat Pritam Singh
For the respondent - Nur Irmawatie DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmadi Asnawi JC:

[1] The appellant, the grandfather of the 12 year old victim, SP2, faced the following amended charge before the Batu Pahat Sessions Court judge:

> Bahawa kamu diantara awal bulan Januari tahun 2003 hingga awal bulan Februari 2003, di Ladang Kelapa Sawit Bukit Kera Moyang, Simpang Renggam, di dalam Daerah Kluang di dalam Negeri Johor telah melakukan inses (sumbang mahram) terhadap XXXX XXXXXX XXXXX XXXXXXXX, No. Surat Beranak XXXXXXX, iaitu kamu telah mengadakan hubungan seks dengan cucu kamu sendiri, dengan itu kamu telah melakukan kesalahan dan boleh dihukum di bawah seksyen 376B(1) Kanun Keseksaan.

[2] The appellant was found guilty and convicted of the offence and was jailed for 15 years. He appealed against both the conviction and sentence. However the latter was withdrawn upon commencement of the hearing of this appeal.

[3] The facts as adduced revealed that it was almost the daily routine of the appellant to ferry SP2 to her afternoon Sekolah Agama classes located a few kilometers away from their home. On that fateful afternoon, the appellant took SP2 on his motorcycle bearing registration number JDM 502 to take her to her Sekolah Agama. Instead of going direct to her school, the appellant stopped at Ladang Kelapa Sawit Bukit Kera Moyang, along the way. At a spot shown in the photographs P5 (A to D), the appellant spread out a mat and thereafter mercilessly ravished the victim. After it was done, the appellant proceeded to send the victim to her Sekolah Agama. After a few more such incidents the victim decided to inform her mother, SP5. Her mother promptly took her to the police station to lodge a report. Her police report is exh. P3.

[4] The amended charge is grounded upon this incident at the said Ladang Kelapa Sawit.

[5] The hearing of this matter was earlier presided by Puan Hayatul Akmal (herein after referred to as "first Sessions Judge"). She heard six witnesses ie, SP1, the doctor who examined the victim; SP2, the victim; SP3, the police photographer; SP4, the police coporal who arrested the appellant; SP5, the victim's mother and SP6, the investigating officer of the case. She heard the case intermittently from 6 June 2003 to 4 October 2004.

[6] However, before the prosecution could close its case, she was transferred to Selayang Sessions Court. On 1 February 2005, Tuan Abu Bakar Katar (herein after referred to as the "Sessions Judge") was directed to take over the conduct of the hearing of the case. He was to continue from where the first Sessions Judge left.

[7] On 9 May 2006, the prosecution applied to recall the victim, SP2 to identify exh. ID7, a photocopy of her Birth Registration Certificate. The examination of the victim on this instant was confined on this issue and on the issue of her date of birth only. Upon the conclusion of the victim's testimony upon her recall, the prosecution closed its case. The learned Sessions Judge did not proceed to rehear nor question the victim on the body of evidence relating to the commission of the offence by the appellant. So too were the other five witnesses. However he offered both the defence and the prosecution to recall the witnesses if they so wished as indicated in his grounds of judgment. But both declined. Neither did they object. Thereafter the learned Sessions Judge proceeded to make a finding that a *prima facie* case has been made out against the appellant and called upon him to enter his defence and finally convicted him of the same.

[8] It was this failure by the learned Sessions Judge to recall and examine these witnesses that the appellant is now complaining. It is the appellant's principal ground of appeal that the learned Sessions Judge by so doing had erred in law and in fact when he took the role of an appeal judge instead that of a trial judge resulting in the appellant being materially prejudiced. Learned counsel added that the assessment on the credibility of each of the witnesses had been prejudiced since he had taken over and continued with the trial from the first Sessions Judge

after the prosecution witnesses had all given evidence. In the alternative it was submitted that the finding of a *prima facie* case by the learned Sessions Judge who had not seen or heard the witnesses jeoparadized the appellant.

[9] In respect of changes of Magistrates or Sessions Judges during hearing, s. 261 of the Criminal Procedure Code (CPC) provides:

> Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial.
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> Provided as follows:
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> (a) in any trial the accused may when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard;
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> (b) the High Court may, whether there be an appeal or not set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had ..., if such court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

[10] It is always desirable that judgment should be given by a magistrate who has heard and recorded all the evidence himself and has seen and heard all the witnesses (*Chong Kwee Hian v. PP* [1948] 1 LNS 10). The power to act on the evidence recorded by a former magistrate is of value when it used for evidence of a more or less formal character, or where the witness cannot be produced. It should not be used where the witness whose evidence was acted on was a crucial one and there was nothing to show that it was impossible to produce the witness (*Mohammad Idris bin Haji Mohamed Said v. R* [1948] 1 LNS 35).

[11] However, in my view s. 261 of the CPC offers a sufficiently wide berth for the succeeding judge to exercise his discretion whether to act upon the evidence recorded by his predecessor or otherwise re-summon the witnesses or start a fresh. It is for him to make a proper assessment upon perusal of the evidence already

recorded that the same is sufficient for the purpose of the continuation of the trial until its full completion without posing any hindrance to him to make a proper finding at the end of the day however crucial the witness or witnesses are. Nevertheless he must be satisfied that the recorded evidence of the witness offers a complete presentation of his evidence. The need to re-summon and rehear the witnesses is less apparent where there is no demand by either party that the witness or any of them be re-summoned and reheard, as was the case in the present appeal. It goes to show that the parties are equally satisfied with the evidence already on record.

[12] Though the learned Sessions Judge did not state his reasons for declining to re-summon and rehear the witnesses, it is obvious that he was satisfied with the evidence recorded by the first Sessions Judge. A perusal of the evidence recorded, principally that of SP2 and SP5, does not reveal anything out of the ordinary to warrant the re-summoning of the witnesses. The questions posed to them were fairly straight forward and simple and their answers were also direct to the point. Of course here and there, there were occasions when the witnesses could not remember some details. But these could be attributed to human fallibilities. On no account could these be counted to erode their credit worthiness. It is apparent that upon perusal of the records, the learned Sessions Judge did not err when he exercised his discretion not to re-summon and rehear the witnesses. He was not wrong to be satisfied with and acted upon the evidence recorded by the first Sessions Judge. That was well within his discretion to do so, a perfect exercise provided by s. 261 of the CPC.

[13] It is trite that by any account a succeeding judge would be very much at a disadvantage when he does not have the means of assessing the demeanour of the witnesses already called (*PP v. Mohd Jon* [1992] 1 LNS 13). In *Abdul Hamid b. Udin v. PP* [2000] 1 LNS 198 his Lordship Abdul Wahab J stated:

> The extent to which the succeeding judge can rely upon the recorded testimony and the weight to give to it must depend upon the nature of the recorded testimony, and the challenge it is subjected to. If the personal credibility of the witness is challenged, his demeanour would be material. An incoming judge would not necessarily be aware if demeanour of any particular witness is important by a reading of the record unless a note of the demeanour is recorded in accordance with s. 271 of the code …

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> ...
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> Where a judge recording the evidence had not found it necessary to record the demeanour of a witness as so provided, then it is fair and reasonable to conclude that the trial judge did not view that demeanour in court of the witness is a very important factor in accessing his credibility. In such a case, the recorded evidence is an adequate presentation of his evidence.
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> ...
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> If the accused is anxious that demeanour should be considered, proviso (a) of the section provides that he may in such cases demand that any of witnesses be re-summoned and re-heard. Such demand would make demeanour into on issue to be considered. Otherwise, consideration of the sworn testimony without reference to demeanour is not by itself a fatal flaw. It must first have been put in issue.

B C D

[14] I have no grounds to depart from the proposition of law expressed therein by his Lordship. Coming back to this appeal before me, if the appellant feels very strongly that the learned Sessions Judge ought to see and hear for himself the demeanour of the aforesaid witnesses to enable him to properly appraise their credibilities, then he should forthwith exercise his right under proviso (a) of s. 261 to demand from the learned Sessions Judge to re-summon and rehear the said witnesses. But this was not done. Nothing was said about the same. It was also not raised in appellant's submissions before the succeeding judge at either the close of the prosecution's case or defence case. This fact goes a long way to show that the demeanours of the witnesses were never an issue with the appellant. Neither was demeanour ever an issue with the first Sessions Judge. No notes were recorded by her relating to the demeanours of the witnesses pursuant to s. 271 of the Code. It simply means that the demeanours of the witnesses is not an important criteria in assessing their credibilities nor would their credibilities be affected significantly by their demeanours. In any event the credibility of a witness is not solely dependant upon his or her demeanour while giving evidence in court. There are other factors of equal importance to determine so, of which the most vital is to test it against the whole evidence in its entirety and the probalities of the case.

E F G H I

[15] SP2, the victim was recalled by the prosecution. However the defence only asked one (1) question. He did not take the opportunity to demand from the learned Sessions Judge to rehear the entire testimony of SP2 for a proper appraisal of the victim's credibility. There was also no request from the defence for further cross-examination of the victim on crucial parts of her testimony to impress upon the learned Sessions Judge on issues relating to the demeanour of SP2 which they want the learned Sessions Judge to see and hear for himself. The same goes with the other witnesses. Hence the complaints heaped upon the learned Sessions Judge over his failure to re-summon and rehear the prosecution witnesses is verily without basis and misplaced.

[16] Next the appellant argued that the charge preferred contained no particulars as to the time of the commission of the offence, a violation of s. 153(1) of the CPC and that the particulars as to the time of the commission of the offence is a mandatory requirement. The time span indicated in the charge was 31 days. This time span had seriously prejudiced the appellant and that by the same he could not put up a proper defence.

[17] However in the light of the authorities, it is my view that there is no merit in such contention. In *Azahan Mohd Aminallah v. PP* [2005] 1 CLJ 374, the Court of Appeal restated the underlying principle in very clear terms "... this judgment does not break new ground. It merely applies settled principles of law to the particular and peculiar fact of the case. It certainly does not establish the proposition that a charge wanting of a specific date is bad and warrants an acquittal ..." Equally in *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737, though his Lordship Abdul Hamid Mohamad FCJ (as he then was) stated that ... "since it is mandatory to state the "time" (date or period) when an offence is alleged to have been committed, it is clearly a material matter and an essential part of the alleged offence ...", his Lordship did not rule that the charge as preferred was flawed or bad in law (the charge against the appellant before me in relation to "time" of the offence was couched in similar fashion). The accused there was acquitted not because the charge was flawed for want of particulars relating to the time of the commission of the offence but was acquitted grounded upon the premise that the prosecution failed to prove the commission of the offence by the accused on the dates intimated in the charge on account of the principal witness propensity to keep changing the dates, thereby incurring the ruling that he was an unreliable witness.

[18] In the same case her Ladyship Rahmah Hussain FCJ said at p. 794 para c:

> As to the significance of the date in the charge, the learned trial judge stated (at p. 365 of [2001] 3 CLJ 313 as follows:
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> In any event a date in the charge has never seen material. In *R v. Severo Dossi* [1918] 13 Cr App R 158 (quoted in *Low Kiat Leng v. PP* [1996] 1 MLJ 252, Lord Atkin observed:
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> From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.

[19] In *Hussin Sillit v. PP* [1988] 2 CLJ 9; [1988] 1 CLJ (Rep) 128 (quoted in *Dato' Seri Anwar Ibrahim v. PP & Anor Appeal (supra)*, Azmi SCJ stated at p. 132:

> ... and under section 156 of the Criminal Procedure Code, "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was in fact misled by such errors or omission ..."

[20] The Federal Court in *Ku Lip See v. PP* [1981] 1 LNS 155 at p. 196 stated:

> With reference to question (1), we are constrained to observe that although the charge has not stated exactly when the offence was committed during the months of May and June 1978 it has nevertheless specifically defined the time and place sufficiently to enable the applicant to answer the charge.

[21] The passages from the authorities quoted above are the short answers to the issues raised by learned counsel in respect of the requirement to state the time of committing the offence in the charge. In my view in this case, the time given in the charge ie, "Bahawa kamu di antara awal bulan Januari 2003 hingga awal bulan Februari 2003 ..." is sufficient enough to give notice to the appellant as to the time he was alleged to have committed the offence. It relates to a certain date during that span of time. The notice relating to the said time was made further apparent when it was followed by the specific location where the offence was committed ie, "di dalam Ladang Kelapa Sawit Bukit Kera Moyang" and no where else. In the event the manner in which

A the time was given in the charge could not in any way prejudiced the appellant in preparing his defence. At all times during the trial the appellant was very well aware what the nature of the charge against him was and he came prepared with his defence.

B **[22]** What is a lot more material in sexual offences are the ingredients of the offence, the most vital being the identity of the offender and the sexual act itself. Obviously time is not an essential ingredient of the offence. The testimonies of the witnesses for the prosecution in particular that of the victim, SP2, very clearly C adverted to the sexual act between SP2 and the appellant that one fine afternoon at Ladang Kelapa Sawit Bukit Kera Moyang and no where else. At the material time the appellant was on his way to send SP2 to her afternoon Sekolah Agama classes. This fact was not disputed by the appellant. The fact that he stopped D by the Ladang was also not disputed during the cross-examination of SP2. In fact it was put to SP2 that the appellant did not have sexual intercourse with SP2 on that occasion but stopped by the Ladang for 10 minutes to allow SP2 to answer the call of nature. Very plainly the appellant knew what he was doing. He came E prepared with his defence. He was obviously not prejudiced by the manner in which the timing of offence was fashioned against him in the charge.

[23] In respect of the 4th and 5th grounds of appeal, the F appellant submitted that the first Sessions Judge erred in law and in fact when she allowed the admission of similar fact evidence which is equally prejudicial to the defence. Inspite of objections by learned counsel, she allowed SP2's evidence that she was altogether raped five times whereas the charge refers to only one G incident of incestuous relationship. However in my view such evidence is relevant and admissible under ss. 14 and 15 of the Evidence Act 1950 as the said incidents took place within the time span intimated in the charge. Though the learned TPR did not follow up with his statement to the court that the prosecution is H at liberty to file additional charges against the appellant on account of the said testimony by SP2, the failure of the prosecution to do so does not in anyway prejudice the appellant materially. In fact the appellant should consider himself lucky that the prosecution did not pile further charges against him.

I

[24] In any event in my view this is a non-issue. The evidence led by the prosecution clearly shows that the focus was on the incident that took place at the Ladang Kelapa Sawit Bukti Kera Moyang. Equally upon perusal of the grounds of judgment of the learned Sessions Judge it is clear that the learned Sessions Judge did not take into account the other four incidents in his findings. He was focused only upon the incident intimated in the charge. His findings were not corrupted by the four other incidents. He was entirely correct in doing so. It does not occasion a miscarriage of justice.

[25] The submission in respect of the 6th ground of appeal is that the learned Sessions Judge failed to take into account the failure of the prosecution to produce the original copy of SP2's Surat Beranak No. XXXXXXX when the same was specifically mentioned in the charge. Again in my view the original copy of the Surat Beranak is not a material ingredient of the charge. Additionally it was the uncontroverted evidence of SP2 that her date of birth was 28 August 1991. She could remember this date even without referring to her Surat Beranak. This was not challenged. Hence the evidence is concrete that she was 12 years old at the material time of the incident. The failure of the prosecution to produce the original Surat Beranak is thus not fatal. The same is never an issue as it is never an essential ingredient of the offence. On a charge under s. 376B of the Penal Code, it is incumbent upon the prosecution to only prove that both the appellant and SP2 were not permitted under the law, religion, custom or usage applicable to them to marry each other, the appellant had sexual intercourse with SP2 and the sexual intercourse was without the consent of SP2. Since SP2 was only 12 years old at the material time she shall be deemed to be incapable of giving consent.

[26] Under grounds No. 7 and No. 8, it is the contention of the appellant that the learned Sessions Judge failed to properly consider the credibility of the victim, SP2, premised upon SP2's police report (exh. P3) describing the figures "1530 HRS", the word "rogol" when she did not understand what the word means, her testimony under cross-examination that she did not know her father's name and her inability to provide an answer for her delay in lodging the report. In my view it is clearly preposterous to

A suggest that she is unworthy of credit just because she faltered on those issues and that her entire report and evidence ought to be rejected.

[27] Exhibit P3 is merely a first information report which triggers B the police investigation against the appellant. SP2 may have said that the incident took place at about 3.30pm but the officer who took down the report opted to use police practice of 1530 hrs. She is not to be faulted for this. The word 'rogol' is only a nomenclature. SP2 may not understand what it means or how to C say it ordinary parlance but her description of what her grandfather (appellant) did to her, in particular her description of the act of sexual intercourse where the appellant forced his private part to enter into her private part is more than sufficient to show what she intended to say in her police report and that the D appellant did indeed have sexual intercourse with her. Her testimony in court clearly negates learned counsel's proposition that she was coached by someone to put the word "rogol" in her police report. On no account could this issue be construed adversely against the credit of SP2. Equally I could see no E possible nexus to link her inability to tell her father's name with her credibility in court. The delay in lodging the police report is not unique to this particular case. It is not an uncommon occurrence. It happens in other cases as well. Here SP2 testified that she did not immediately lodge a police report because she F was frightened. This is a plausible enough reason.

[28] The learned Sessions Judge correctly applied the test laid down by Raja Azlan Shah FJ (as His Majesty then was) in *Tengku Mahmood v. Public Prosecutor* [1974] 1 LNS 176 in accessing the G credibility of SP2 as shown at p. 17 of the rekod rayuan (RR). SP2's evidence was tested against the totality of the evidence of other witnesses. Having done so he found SP2 to be a credible witness and accepted her testimony. I need add no more to what has been stated and decided by the learned Sessions Judge H therein.

[29] It was also the submission of learned counsel that the learned Sessions Judge failed to heed the requirement of s. 133A of the Evidence Act in accepting SP2's uncorroborated evidence. The learned Sessions Judge dwelt at length on this issue at pp 18, I 19 and 20 of the RR. In my view his reading of s. 133A is entirely correct. SP2 gave evidence on oath. She understood her

oath. As such there is nothing to prevent the acceptance of her evidence even if uncorroborated, provided the court is satisfied with her evidence. This was the approach taken by the learned Sessions Judge. He was satisfied with the evidence given by SP2. I shared his view in this respect. A perusal of SP2's testimony at pp 52 to 55 of RR explains why. Her testimony relating to the events leading to the sexual intercourse and the sexual intercourse itself is vivid and crystal clear. She could not have invented her testimony unless she went through the experience herself. She was even able to describe the length and colour of the appellant's private part and that she saw slimy watery substance spurting out from the appellant's private part after the intercourse was done. Her testimony was unequivocal that the appellant entered his private part into hers. There is no reason to treat her testimony with suspect.

[30] The learned judge had also warned himself of the danger of convicting on uncorroborated evidence – *Chiu Nang Hong v. PP* [1964] 1 LNS 24, *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159. He also gave his reasons why *Loo Chuan Huat v. PP* [1971] 1 LNS 68 and *PP v. Richard Devadasan Sabariah* [2004] 4 CLJ 367 has no application in this case. He was not wrong here.

[31] Contrary to the submissions of learned counsel I am satisfied, as was the learned Sessions Judge, that SP2's evidence was amply corroborated by the testimony of SP1, the medical officer who conducted a medical examination on her. She confirmed that her external genitalia examination revealed an old hymen tear at 6 and 12 o'clock position. She confirmed further that the tear was occasioned by an entry of blunt object the like of the male private part into SP2's vagina. She also confirmed that it could not have been due to exercises or riding bicycle as proposed by learned counsel.

[32] SP1's testimony is a good enough corroboration that the appellant's private part had entered into SP2's private part as testified by SP2 – see *Syed Abu Tahir a/l Mohd Esmail v. PP* [1988] 1 LNS 126. In any event it was never suggested to SP2 that the hymen tear was self inflicted. Equally it was also never suggested to SP2 that SP2 have had sexual encounters with other males other than the appellant. It was also not suggested that SP2 harboured an axe to grind against the appellant to such an extend that she is prepared to see the appellant behind bars.

[33] Additionally the testimony of SP5, SP2's mother, is a corroboration of SP2's testimony. In *Sidek Ludan v. PP* [1995] 1 LNS 219 the testimony of the victim's mother was accepted as corroborative evidence. SP5 too did not nor was it ever suggested that she had harbour a grudge to grind against the appellant. The appellant is her own father, blood and flesh. There is no reason for her to concoct such a story to inflict so much pain and agony to her own father.

[34] In the event I find no merit in respect of this ground of appeal.

[35] The 9th and 10th grounds of appeal that the learned Sessions Judge erred in law and in fact when he found that the prosecution had made out a *prima facie* case against the appellant are also without basis. Again learned counsel harped on the inability of the learned Sessions Judge to evaluate the demeanours of the witnesses on account of his refusal to recall the prosecution witnesses upon him taking over the conduct of the hearing from the first Sessions Judge. I have addressed this issue at length earlier and have no wish to have a repetition here but suffice to state "... but the demeanour is not always the touch-stone of truth. It is only one ingredient in arriving at a finding of credibility ..." *(Tengku Mahmood v. Public Prosecutor (supra)*. I have also addressed the issue of SP2's delay in lodging the police report, the testimony of SP2 being a child witness and the admission of prejudicial/similar fact evidence raised by learned counsel under these two grounds of appeal. Learned counsel's contention that the learned Sessions Judge failed to provide his grounds in finding that a *prima facie* case has been made out against the appellant is equally irrelevant and baseless for there is nothing in law compelling him to do so.

[36] Under ground No. 11 learned counsel complained that the learned Sessions Judge erred in law and in fact when he was not given the opportunity to make oral submissions after the written submissions were filed by both parties. Thus the impact of oral submissions is lost. As a result the appellant was prejudiced. Again I find no merit in this argument. The RR shows that both the parties were the ones who requested for written submissions. The RR also shows that learned counsel did not and has neither applied that he be allowed to make oral submissions upon filing of the written submissions nor indicated to the learned Sessions

Judge that he would want to make oral submissions at any point of time. Since learned counsel did not ask for it, he cannot now complain the he was denied the opportunity of making the oral submissions by the learned Sessions Judge to the detriment of the appellant.

[37] In my view this ground is plainly devoid of substance.

[38] In grounds No. 12, 13 and 15, learned counsel contended that the learned Sessions Judge erred in law and in fact when he failed to properly assess and consider the appellant's defence of suffering from impotency for the past ten years and therefore is incapable of performing the act of sexual intercourse. He added that the learned judge did not come up with complete reasons for rejecting the appellant's defence of impotency. Additionally the prosecution's failure to subject the appellant to any test to determine his potency is fatal to their case.

[39] I have scrutinized the learned Sessions Judge's reasons for rejecting the appellant's defence (see pp 25 to 31 of RR). I find his reasonings to be wholesome and could find no fault therein. Firstly, the said defence was never put to SP2, SP1 or the Investigating Officer, SP6 during their testimonies at the prosecution stage. It was sprung for the first time when the appellant offerred his defence from the witness box. Hence it was his finding that the said defence was merely an afterthought. The learned Sessions Judge was entirely correct. The law is trite that it behoves upon the defence to put its case at the earliest possible stage, one of which is through the cross-examination of the witnesses at the stage of the prosecution's case, otherwise the defence faces the risk of being branded as a recent invention – *Public Prosecutor v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285.

[40] Next the learned Sessions Judge opined that it was not incumbent upon the prosecution to prove the potency of the appellant. He found support in *Amran bin Ahmad v. PP* [2006] 2 CLJ 897 to the effect that "... ujian potency bukanlah satu ujian yang mesti dilakukan di dalam setiap penyiasatan kes-kes rogol atau sumbang mahram. Jika ujian itu dilakukan ia akan membantu kes pendakwaan. Jika ia tidak dilakukan, ini tidak bererti bahawa seseorang itu tidak berupaya melakukan persetubuhan, jika terdapat keterangan lain yang boleh membuktikan keupayaan orang itu

untuk melakukan persetubuhan". He also relied on *PP v. Dato' Seri Anwar Ibrahim & Anor* [2001] 3 CLJ 313, wherein the learned judge therein agrees with the view that it is not necessary that the potency of the accused must be proved in each case as potency will be presumed until the contrary is proved by the accused. I can find no fault with the legal proposition applied by the learned Sessions Judge. Equally I am in all fours and subscribed without more with the rulings expressed by his Lordships in the authorities referred to above. The uncontroverted evidence of SP2 that the appellant forced his private part into her private part and the slimy watery substance spurting from the appellant's private part after the sexual intercourse was done were clear evidence of the appellant's sexual prowess and potency. Additionally the old hymen tear found by SP1 upon her external examination of SP2's genitalia, which the appellant did not ascribe to have been due to sexual intercourse with other males or due to other causes, is solid prove of penal penetration which again indicated the appellant's sexual prowess and potency.

[41] On the totality of the evidence adduced it was not wrong for the learned Sessions Judge to find as he did in fact found, that the appellant's defence of impotency was without merit. The evidence adduced wholly fortified his rejection of the said defence.

[42] For all the reasons given, the appellant's appeal is dismissed. The conviction pronounced against him is confirmed.